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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
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10 FEDERAL TRADE COMMISSION,

11 Plaintiff,

12 v.

13 AMAZON.COM, INC.,

14 Defendant.

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16 **Case No. 2:14-cv-01038-JCC**

17 **PLAINTIFF'S REPLY IN SUPPORT
18 OF MOTION TO COMPEL
19 DISCOVERY RESPONSES**

20 NOTE ON MOTION CALENDAR:
21 Friday, July 3, 2015

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PLAINTIFF'S REPLY IN SUPPORT OF
MOTION TO COMPEL
Case No. 2:14-cv-01038-JCC

Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington, DC 20580
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There are two categories of discovery in dispute: (1) in-app charge data Amazon agreed to produce and now does not want to, attempting to revive objections it waived months ago; and (2) contact information for injured consumers Amazon refused to compensate. Amazon would have this Court believe that compliance with the disputed discovery requests would involve “extraordinary intrusions.” Dkt. 32 at 3. This is impressive hyperbole, in service of which Amazon misconstrues the applicable legal standards, the discovery at issue, and the parties’ negotiations. Given the correct standards and the scope and relevance of the disputed discovery, this Court should grant the FTC’s motion to compel.

I. The Court Should Compel Amazon to Produce Information it Previously Agreed to Produce in Response to Interrogatory No. 2 and Request for Production No. 37.

Through artful parsing of the parties' exchanges about Interrogatory No. 2 and Request for Production No. 37, Amazon attempts to reclaim relevance and burden objections it waived months ago. Dkt. 32 at 12. When Amazon said in January 2015 that there was "nothing to compel" on these requests, it apparently did not mean it. Amazon insists that its agreement to produce the requested data "[d]espite the burden to do so" preserved—indefinitely—its objections, because of this caveat: "to the extent it is reasonably available." Dkt. 32 at 12; *see* Dkt. 24 at 5-6, 105. At the time, thinking a motion to compel necessary, the FTC broached this exact issue by email: "When Amazon says it will produce only 'reasonably available' documents or information, that's just another way of perpetually maintaining boilerplate burden objections without (as is required) explaining the alleged burden. It unnecessarily obscures what Amazon will and will not produce and indefinitely delays production of the requested information." Dkt. 24 at 104 (January 30, 2015 email from J. Adler to D. Foley).¹ To eliminate doubt, the parties

¹ This has been Amazon’s mode from the outset. When pressed for a production deadline, Amazon committed to substantially complete its “rolling” production by May 15, 2015. In May, it dumped over 160,000 pages of documents on the FTC and claimed it was “finalizing the review of the small amount of remaining documents and [would] produce these documents shortly[.]” Dkt. 35 at 26. Since then, it continues to make surprise multi-thousand page “clean-up” productions—most recently, custodial documents for depositions scheduled for *next week*. See Suppl. Decl. ¶¶ 2-3.

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1 met and conferred on February 3, 2015—a call Amazon’s opposition omits. *See* Dkt. 32 at 12.
 2 During that call, Amazon assured the FTC that it would produce all responsive data in its
 3 possession for the agreed set of apps. Dkt. 24 at 6; Suppl. Decl. ¶¶ 3-4. Amazon evidently
 4 changed course in the following months, but did not reveal its turnabout, let alone discuss the
 5 alleged burden of producing the withheld data. *See* Dkt. 24-1 at ¶ 14. Amazon cannot revive
 6 waived objections at this late stage.

7 **A. The Requested Data is Relevant.**

8 Amazon insists the FTC must show the withheld data’s relevance clears some unspecified
 9 threshold of importance before Amazon should have to complete its data production. This turns
 10 relevance on its head. Ordinarily, discovery is allowed “unless it is clear that the information
 11 sought can have no possible bearing upon the subject matter of th[e] action.” *Lauer v. Longevity*
 12 *Med. Clinic PLLC*, No. C13-0860-JCC, 2014 WL 5471983, at *3 (W.D. Wash. Oct. 29, 2014)
 13 (quoting *Ragge v. MCA/Universal Studios, Inc.*, 165 F.R.D. 601, 604 (C.D. Cal. 1995)). That
 14 standard applies equally here.

15 The data Amazon is withholding is relevant. Interrogatory No. 2 seeks data about in-app
 16 charge attempts, including whether the charge was successful. Dkt. 24 at 4-5. When a charge is
 17 successful, the sequence of “metric events” Amazon logs will include everything from initiation
 18 to success.² When it is not, the list of events will stop short of success with an event signifying
 19 failure. Amazon attempts to misdirect the Court, arguing that the only data that could “possibly”
 20 be relevant is the data related to successful charges. Dkt. 32 at 13. But in-app charge attempts
 21 within children’s apps that failed due to unsuccessful password entry can tell us, most notably,
 22 about unauthorized charges before Amazon implemented the various components of its cryptic
 23 and sporadic password-prompting scheme. Dkt. 24 at 5; Ex. N at 18 (Amazon admitting “[a]

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² Despite agreeing to define the metric events in the data it produced, Dkt. 32 at 22 (June, 17 2015 email from D.
 26 Foley), Amazon has not done so. A full interrogatory response requires Amazon to say what these values mean.

1 large share of the failed password entries could be from children getting blocked by parental
 2 controls”). The frequency of failed password entry without ultimate success in children’s apps is
 3 evidence of the frequency with which the same segment of charges were unauthorized before
 4 Amazon instituted the particular password prompt. This bears on both liability and relief. By
 5 any measure, the FTC has shown the withheld data is relevant.

6 **B. Amazon Has Not Shown That Completing Its Production Would Impose an**
 7 **Undue Burden that Outweighs the Likely Benefit.**

8 Amazon argues that completing its response to Interrogatory No. 2 would impose a
 9 “[s]ubstantial” burden. Dkt. 32 at 13. But Amazon must show that the withheld data is “not
 10 reasonably accessible” due to *undue* burden or cost. Fed. R. Civ. P. 26(b)(2)(B). Notably,
 11 pursuant to the parties’ ESI agreement, Dkt. 13 at 3, Amazon previously represented that *none* of
 12 its data sources were inaccessible. Suppl. Decl. ¶ 4. The fact that providing the withheld data
 13 would take time and resources does not mean the database at issue is not reasonably accessible.
 14 *Cf. Thomas v. Cate*, 715 F. Supp. 2d 1012, 1033-34 (E.D. Cal. 2010) (citing cases) (over one
 15 hundred hours of review time does not establish undue burden). Amazon dubs the database in
 16 question “archival,” Dkt. 34 ¶¶ 6-7, but it is not a backup source; it contains recent data that is
 17 indexed and in use. *Cf. Starbucks Corp. v. ADT Sec. Servs., Inc.*, No. 08-CV-900-JCC, 2009 WL
 18 4730798, at *6 (W.D. Wash. Apr. 30, 2009) (data reasonably accessible). Internally, Amazon
 19 regularly trades in in-app charge data, *see* Exs. I, N, and has analyzed the type of data we are
 20 seeking: failed in-app charges due to failed password entries. *E.g.*, Ex. N at 18.

21 Amazon’s opposition further undermines its argument that the withheld data is not
 22 reasonably accessible. Amazon just finished accessing the *same* database to produce data about
 23 successful in-app charge attempts. Dkt. 34 ¶¶ 7, 9. And producing information about failed
 24 attempts apparently would be *less* time consuming than the search Amazon already has
 25 completed. *Id.* ¶¶ 11 (successful charges took two engineers several weeks to complete), 15
 26 (failed charges would take one engineer several weeks to complete). Amazon insists that such

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1 production would be more difficult, however, in part because the search cannot be limited to
 2 specific Order IDs.³ Dkt. 32 at 14. But Amazon cannot use as a shield in discovery the fact that
 3 it “has chosen a means to preserve the evidence which makes ultimate production of relevant
 4 documents expensive.” *Starbucks*, 2009 WL 4730798, at *6 (internal quotation marks and
 5 citation omitted); *see also Simon v. ProNational Ins. Co.*, No. 07-60757-CIV, 2007 WL
 6 4893477, at *2 (S.D. Fla. Nov. 1, 2007) (defendant cannot claim undue burden by citing
 7 deficiencies in its own filing system).

8 Even if Amazon could demonstrate that the requested data is not reasonably accessible,
 9 there is good cause to compel production, considering the Rule 26(b)(2)(C) factors Amazon does
 10 not. The needs of the case (timely completion of written discovery), the amount in controversy
 11 (at least tens of millions of dollars), the parties’ resources (Amazon is a massive company with
 12 ample resources), and the importance of the discovery (this is the only source Amazon identified
 13 for the data) all counsel toward compelling production. *Cf. Nat'l Union Fire Ins. Co. v.*
 14 *Coinstar, Inc.*, No. C13-1014-JCC, 2014 WL 3396124, at *5 (W.D. Wash. July 10, 2014)
 15 (granting motion to compel; responding party did not “apply the facts to the considerations set
 16 out in Fed. R. Civ. P. 26(b)(2)(C)(iii), assuming the information is relevant”).

17 **II. The Court Should Compel Amazon to Produce Information Responsive to
 18 Interrogatory No. 4.**

19 Amazon spends most of its brief claiming the FTC’s motion implicates consumers’
 20 “expressive content” and First Amendment interests, as if repetition will make it true. *See* Dkt.
 21 32 at 3-11, 14. Amazon’s argument ignores the interrogatory in question, which does not seek
 22 expressive content. Indeed, Interrogatory No. 4 does not even seek the name of any app or in-
 23 app item. It seeks (1) contact information for injured consumers who contacted Amazon but did
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25 ³ Amazon repeatedly cites the *total* number of metric events, but says it already has produced events corresponding
 26 to successful charges in the agreed list of apps. Dkt. 34 ¶ 9. The FTC’s motion asks Amazon to produce those
 events that correspond to null Order IDs within the agreed list of apps, not to repeat work it has completed.

1 not obtain refunds and (2) Amazon’s basis for refund denials (e.g., its stated no-refund policy, an
 2 unstated internal policy, a judgment call). Dkt. 24 at 7. This is not expressive content.

3 Amazon apparently concedes this, Dkt. 32 at 9 (“on its face Interrogatory No. 4 does not
 4 ask for the associated content”), instead claiming that identifying injured consumers who were
 5 denied refunds would somehow allow the FTC to cross-reference “previously disclosed
 6 information” to unveil expressive content. *See id.* at 6. The mechanics of this are unclear, given
 7 that Amazon has scrubbed its production to date of all consumer identifying information.⁴ Dkt.
 8 32 at 4-6. The FTC could not link a traditional response to Interrogatory No. 4 to the other
 9 documents Amazon produced even if it wanted to. *See* Dkt. 24 at 8-9.

10 Alternatively, Amazon argues that obtaining consumer contact information would allow
 11 the FTC to contact consumers, who voluntarily could discuss the unauthorized charges at issue.
 12 *Id.* at 9. That is exactly right, and it is several levels below extraordinary. As a consumer
 13 protection agency, the FTC frequently contacts injured consumers, often using information
 14 obtained from defendants or potential defendants.⁵ *E.g., FTC v. Invention Submission Corp.*, No.
 15 MISC.89-272(RCL), 1991 WL 47104, at *4 (D.D.C. Feb. 14, 1991), *aff’d*, 965 F.2d 1086 (D.C.
 16 Cir. 1992) (“[A]ny other state of affairs would undermine the Commission’s mandate to
 17 investigate unfair business practices and allow any organization under investigation to escape
 18 scrutiny” by withholding consumer information). These consumers often choose to speak with
 19 us and voluntarily submit affidavits documenting their experiences. As detailed below, such
 20 affidavits would be relevant to many issues in question.

21 **1. The Requested Information is Relevant.**

22 Amazon claims the FTC must show not just relevance but a “compelling need” for the
 23 consumer contact information requested in Interrogatory No. 4. Because the interrogatory does

24 ⁴ Interrogatory No. 4 does not require Amazon to unredact consumer information from the documents it produced.
 25 Instead, Amazon can respond in the traditional way, with a written response rather than a pile of documents.

26 ⁵ The FTC takes its privacy responsibilities seriously and is adept at protecting confidential information it obtains.
See 15 U.S.C. § 57b-2 (“Confidentiality”); 16 C.F.R. § 4.10 (“Nonpublic material”).

1 not implicate the First Amendment, however, ordinary relevance applies. The requested
 2 information is relevant—even compellingly so. *See* Dkt. 24 at 7; Dkt. 32 at 9.

3 Consumers whose children incurred unauthorized charges (and who requested but were
 4 denied refunds) are potential fact witnesses in this case and are entitled to relief. These
 5 consumers likely have information about topics ranging from whether, as Amazon contends, they
 6 understood that Amazon might bill them within children's games to the efforts involved in their
 7 unsuccessful attempts to obtain a refund for unauthorized charges. Amazon nonetheless
 8 maintains the FTC must show it would be insufficient to obtain this information through other
 9 means, such as by scouring social media for statements by injured consumers Amazon refused to
 10 compensate. Dkt. 32 at 10. This is not a basis for denying discovery. *See Microsoft Corp. v.*
 11 *Hertz*, No. C04-2219C, 2006 WL 1515602, at *1 (W.D. Wash. May 24, 2006) (responding party
 12 need not be only source for requested discovery).

13 **2. Amazon's Response to Interrogatory No. 4 is Insufficient.**

14 Putting contact information aside, Amazon's opposition illustrates that a Rule 33(d)
 15 response would not suffice. Amazon responded to Interrogatory No. 4 with a litany of
 16 objections, Dkt. 24 at 10, and separately instructed the FTC to comb through hundreds of
 17 thousands of pages of consumer complaints for the requested information. As Amazon admits,
 18 that information may not be in the documents: whether a refund request was denied may be
 19 absent or inaccurate, Dkt. 32 at 5, 9-10 n.4, and the basis for the refund denial often requires
 20 familiarity with several factors to “assess what the agent probably did and what the reasons most
 21 likely were.” Dkt. 33 ¶ 3; *see* Dkt. 32 at 11-12 (“[A]nalysis of communications text and agent
 22 annotations is necessary to identify the reason for a refund denial and, in many cases, to
 23 determine whether a refund was requested or denied.”). This Court should compel Amazon to
 24 respond to Interrogatory No. 4 in full.

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1 Dated: July 6, 2015

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CERTIFICATE OF SERVICE

I, Jason M. Adler, certify that on July 6, 2015, I electronically filed the foregoing Plaintiff's Reply in Support of Motion to Compel Discovery Responses with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record.

By: /s/ Jason M. Adler

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